UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES

v. **Crim. No. CR09-170-ML**

DIMITRIT VALLEJO LARA,
DEFENDANT

DEFENDANT'S MEMORANDUM OF LAW ON GOVERNMENT'S AGREEMENT TO RECOMMEND SAFETY VALVE

The Defendant, Dimitrit Vallejo Lara, submits this memorandum of law on the issue of whether the government can be held to its previous representation before this court on December 2, 2010, to recommend that the Defendant receive the sentencing benefit of the safety valve, U.S.S.G. 5C1.2 and 18 U.S.C. 3553(f).

Statement of Facts

Defendant is charged with violations of 21 U.S.C. §§ 841 and 846 (possession of heroin with intent to distribute, and conspiracy to possess heroin with the intent to distribute). The charges arise from a traffic stop that occurred on December 4, 2009, in Cranston, Rhode Island. On June 17, 2010, Defendant filed his Notice of Intention to Plead Guilty. (Docket Entry #36). On June 23, 2010, Defendant entered a plea of guilty to Counts I and II. Sentencing was set for December 2, 2010.

On October 25, 2010, Defendant filed a Motion for a Downward Departure. (Docket Entry #38). Sentencing convened on December 2, 2010. During the hearing, Government counsel requested a recess so it would interview Defendant regarding a downward departure due to the safety-valve. See U.S.S.G. 5C1.2 and 18 U.S.C. 3553(f). After the interview concluded, Government counsel represented to this court that it was going to recommend that Defendant receive the benefit of the safety-valve. However, sentencing was continued until December 15, 2010, as defense counsel objected to the PSR guideline calculation with respect to the 2-level enhancement for possession of a dangerous weapon (4 inch knife).

On December 15, 2010, after the Court overruled the defense objection to the 2-level enhancement for possession of a dangerous weapon, this Court requested the status of the Government's position on the safety-valve. Government counsel informed this Court that it was not going to recommend that the Defendant receive the benefit of the safety-valve. This Court gave the defense until December 29, 2010, to submit a memorandum of law on whether the Government can be held to its earlier representation to the Court that it was going to recommend the safety-valve.

ARGUMENT

I. THE GOVERNMENT MUST HONOR ITS REPRESENTATION TO RECOMMEND THE SAFETY VALVE BASED ON DUE PROCESS FUNDAMENTAL FAIRNESS AND CONTRACT LAW

When "Congress enacted the Violent Crime Control and Law Enforcement Act of 1994, it passed into law a safety valve provision which permits judicial departures for some low-level, first-time offenders who otherwise would face mandatory minimum sentences. Pub.L. No. 103-322 § 80001, 108 Stat. 1796, 1985 (1994) (amending 18 U.S.C. § 3553)." United States v. Miranda-Santiago, 96 F.3d 517, 527 (1st Cir. 1996).

Under 18 U.S.C. § 3553(f), a defendant may avoid the mandatory minimum and be sentenced below the applicable guideline term, if he or she meets the five requirements set forth in the provision. The section provides:

> **f) Limitation on applicability of statutory minimums in certain cases.--** Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under

> section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, *after the Government has been afforded the opportunity to make a recommendation*, that—
>
> (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
>
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
>
> (3) the offense did not result in death or serious bodily injury to any person;
>
> (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
>
> (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

18 U.S.C.A. § 3553 (West).

Under 18 U.S.C. § 3553(f), the Government in this case represented to this Court on December 2, 2010 – after interviewing the Defendant and obtaining what it wanted – that it was going to recommend that he receive the safety valve. After an unrelated hearing into a sentence enhancement for a weapon, the Government decided that it was not going to change its recommendation.

The safety valve comes into play between the plea of guilty and sentencing, and bears a strong resemblance to a plea bargain. In fact, safety valve debriefing occurs after the entry of the plea of guilty, and before sentencing – with the principle that the Government and the Defendant will both receive a benefit. When the Defendant made the offer to the Government for the safety valve, the Government accepted. This is an offer and acceptance, which is governed by contract law. Case law makes it clear that the Government must honor its side of a bargain. If the Government must honor its agreements in guilty plea negotiations, then it must also honor its agreements when a defendant agrees to debriefing to satisfy the rigid criteria of the safety valve. The defendant could not locate any case directly on point, but the law of plea agreements appears persuasive.

The Supreme Court has stated that "when a [guilty] plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971). This same reasoning is certainly persuasive here, as the Defendant agreed to a safety-valve interview with the Government in exchange for a downward departure at sentencing under the safety valve. The Government was clearly satisfied after the interview, as it acknowledged before this Court that it was going to recommend the safety valve. Contract law (including parol contracts and promissory estoppel) and due process fairness principles come into play when the Government changes its position after acknowledging that it received what it bargained for:

> On this record, petitioner "bargained" and negotiated for a particular plea in order to secure dismissal of more serious charges, but also on condition that no sentence recommendation would be made by the prosecutor. It is now conceded that the promise to abstain from a recommendation was made, and at this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial.

Santabello v. New York, 404 U.S. 257, 263 (1971).

The Court's approval of a safety valve reduction presupposes "fairness in securing agreement between an accused and a prosecutor." Santobello v. New York, 404 U.S. at 261, 92 S.Ct. at 498. The source of the fairness requirement is constitutional, presumably substantive due process. See Cooper v. United States, 594 F.2d 12, 15-16 (4th Cir.1979). Fundamental fairness mandates that "the most meticulous standards of both promise and performance must be met by prosecutors engaging in plea bargaining." Correale v. United States, 479 F.2d 944, 947 (1st Cir.1973).

There can be no question that the government's reversal of its position implicates due process. As the U.S. Supreme Court observed in the context of prisoners losing good time credits:

> We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government, Dent v. West Virginia, 129 U.S. 114, 123, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889). Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.

Wolff v. McDonnell, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976, 41 L. Ed. 2d 935 (1974). If a prisoners' loss of good time credits implicates the Due Process Clause, then surely the loss of the safety valve in this case also implicates it. [1] [2]

The proper remedy is specific performance of the Government. Santobello v. New York, 404 U.S. at 263, 92 S. Ct. at 499.

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[1] Notably, "whether there is a binding plea agreement or, as here, a *non-binding agreement*, if it is determined that a defendant has met the five requirements of the provision, the judge is required to set aside the mandatory minimum and sentence the defendant under the Guidelines." Miranda-Santiago, 96 F.3d at 528 (emphasis supplied).

[2] Under U.S.S.G. § 2D1.1(b)(7), a defendant who satisfies the § 5C1.2 criteria -- identical to the § 3553(f) statutory criteria -- is entitled to a 2-level reduction to his or her offense level, regardless of whether a statutory minimum sentence is at issue.

CONCLUSION

For these reasons, defendant requests that this Court order the Government to honor its previous representation to this Court that it will recommend that this Defendant receive the safety-valve.

Respectfully submitted,

/s/ Joseph J. Voccola, Esq., #4132
454 Broadway
Providence RI 02909
Ph. (401) 751-3900
FAX (401) 751-8983

Dated: December 29, 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 29, 2010, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to: Adi Goldstein, Esq., United States Attorney's Office, 50 Kennedy Plaza, 8th Floor, Providence RI 02903.

/s/ Joseph J. Voccola
Joseph J. Voccola